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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 542

ELIZABETH ARDEN SALES CORPORATION,
PETITIONER AND APPELLANT BELOW,
vs.
GUS BLASS COMPANY, RESPONDENT
AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. HOWARD CARTER,
A. W. DOBYNS,
A. F. HOUSE,
Counsel for Petitioner.

J. W. BARRON,
Of Counsel

SCHUHMANN & SCHUHMANN, PRINTERS, ST. LOUIS

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PETITION.

TO THE HON. HARLAN F. STONE, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In an action for alleged violation of the Clayton Act as amended by the Robinson-Patman Act, tried without a jury,

the Petitioner was found to have violated Sec. 2 (d) and (e), 49 Stat. 1526, 15 U.S.C.A. § 13 (d) and (e) and under 15 U.S.C.A. §15, 38 Stat. 731, was held liable for three-fold the damages claimed. (R. 79) The Circuit Court of Appeals for the Eighth Circuit affirmed (R. 114) and denied rehearing on September 12, 1945 (R. 133). The essential facts both as to violation and damage were undisputed.

The Sub-sections of said Act involved respectively provide:

> "(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."
>
> "(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

As to violation the question is whether or not Petitioner dealt with Respondent and M. M. Cohn Company, a competitor of Respondent, on proportionally equal terms.

Respondent and M. M. Cohn Company are department stores in the City of Little Rock, Arkansas, each having a cosmetic department. Petitioner sold its cosmetic products, hereinafter called "Arden products" to each of said stores in interstate commerce. Respondent became a retail outlet for Arden products commencing in August, 1938, (R. 42) and continued to handle the line through August, 1940,

(R. 42). M. M. Cohn Company had theretofore exclusively retailed Arden products in Little Rock since 1920 (R. 69). For many years it had been the practice of cosmetic companies to furnish to their retail outlets what is known as "demonstration" (R. 45). A sales girl is selected to become the demonstrator of a particular line of cosmetics and receives some special training (R. 40). The use of demonstrators originated with some enterprising salesman in order to get for his line more favorable quality and quantity of sales (R. 40). This proved effective; consequently, other lines of cosmetics had to furnish demonstrators (R. 40). A demonstrator is not allowed to use unfair tactics and must sell the product requested by a customer although it be a competitive line, but if the customer has no preference, the demonstrator will endeavor to introduce her own line. There is also the idea that the demonstrator shall advertise her line by suggesting it to customers who come to the cosmetic counter for toothpaste, etc. (R. 40)

Petitioner paid the Respondent one half the salary of the Arden demonstrator in its store, which payment amounted to $10 per week (R. 75). Petitioner paid the full salary of $20 per week of the Arden demonstrator in the M. M. Cohn Company store (R. 75). Petitioner contended that measured by the tangible yardstick of volume of purchases, it treated Respondent and its competitor, M. M. Cohn Company, with proportionate equality.

By calendar year the net purchases were:

1938		
Gus Blass Co. (commencing in August)	$5,117.78	(R.67
M. M. Cohn Company (entire year)..	9,705.90	(R.69)
1939		
Gus Blass Company	4,045.74	(R.67)
M. M. Cohn Company.....	9,210.03	(R.69)
1940		
Gus Blass Company (through August)	$1,975.30	(R.67)
M. M. Cohn Company (through August)	5,548.54	(R.69).

Because Respondent did not commence its operation with Petitioner until August, 1938, whereas M. M. Cohn Company had dealt with Petitioner during that entire calendar year, discussion here of the legal situation for 1938 would involve argumentative matters. Comment for such period is, therefore, reserved for the supporting brief. It may be appropriate now to point out that the question as to violation of the Act during 1938 presents a difficult point on which there is no precedent.

The records of purchases by Respondent and M. M. Cohn Company appear at pages 67 and 69, respectively, of the record. Calculations therefrom show during 1939 the cost to Petitioner of demonstration to Respondent was 12% of Respondent's net purchases. This was equivalent to a refund to Respondent of $12 on every $100 net purchase, so that during 1939 Respondent actually received $100 worth of merchandise for $88.

A similar calculation as to M. M. Cohn Company for such year shows the cost to Petitioner of the demonstration to be 11%. This was equivalent to a refund to Cohn of $11 on every $100 net purchase so that Cohn received $100 worth of merchandise for $89, although it purchased more than twice as much as Respondent.

Had Respondent received a full demonstration of $20 a week during that year, the cost to Petitioner would have been 24% so that Respondent would have received $100 of merchandise for $76 at the time its competitor Cohn was paying $89 and buying more than twice as much.

Similar calculations through August, 1940, after which Petitioner no longer dealt with Respondent, show the cost of demonstration to Respondent was 16%, and the cost of demonstration to Cohn was 10%. So that a full demonstration to Respondent would have cost Petitioner 32% of Respondent's net purchases, equivalent to a refund of $32 on every $100 net purchase, while Cohn, which bought almost three times as much, got a refund of $10 on every $100 net purchase.

If the period of Respondent's operation be viewed in the aggregate, calculations as set out in the supporting brief show Respondent purchased 37.6 per cent of the total merchandise bought by it and Cohn, and received 33⅓ per cent of the total demonstration paid, which is submitted to be substantially proportionate equality. But damages representing the mere difference between $20 and $10 per week for 101 weeks were allowed as though Respondent had purchased 50 per cent of the total merchandise.

Thus, there is presented another question of first impression—how is "proportionate equality" determined?

In November and December of 1940 Respondent turned over and M. M. Cohn Company purchased from it the Arden merchandise which Respondent had on hand of the value of $2,463.04 (R. 42, 67, 69), which exceeded its purchases for that year.

There was no evidence at all as to what was said between the parties at the time the arrangement was made for Respondent to handle Petitioner's products. The arrangement was made between a representative of Respondent who died in 1939, prior to the trial, (R. 38, 46) and a representative of Petitioner who at the time of the trial was employed by another cosmetic manufacturer (R. 54) and who was not called as a witness. The record is, therefore, silent as to whether or not it was made known to Respondent that under certain circumstances it could obtain from Petitioner a full demonstration and if so, what those circumstances were, or whether the payments were based on volume.

The opinion of the Circuit Court of Appeals was that because the agreement between Petitioner and Respondent did not relate the payments to Respondent to volume or anything else, and because there was no way under the agreement for Respondent to qualify for a full demonstration, the contract was at its inception a violation of said sub-sections (d) and (e) (R. 95, 106). The opinion was

further that volume not having been made the basis of the payments in the beginning, it could not thereafter be used to justify the difference in treatment (R. 106-107).

Petitioner filed in the Circuit Court of Appeals its petition for rehearing, showing among other things that the record was utterly silent as to just what the arrangement was, and that if the case be made to turn upon the initial contract between the parties, the Respondent had failed to carry the burden of proof of showing same to be unlawful, since no evidence was introduced on that phase of the case (R. 115). The petition for rehearing was denied without opinion (R. 133).

As to damages, the complaint did not allege (R. 3), nor the evidence show, any loss of business or injury to the business of Respondent. The sole damage claimed was the difference between the amount paid Respondent and the amount paid by its competitor, M. M. Cohn Company, which difference was, of course, $10 per week (R. 3). This measure of damages was allowed in both courts for 101 weeks, and under 15 U.S.C.A. § 15, 38 Stat. 731, was trebled (R. 79). The record reflects that both Respondent and its competitor Cohn sold the merchandise in question to the retail trade at the same price under Fair Trade Agreements (R. 77) so that the alleged discrimination was not and could not be translated into a competitive weapon. Petitioner unsuccessfully contended below that the payment of $20 a week to the competitor being a gain to the competitor but not a loss to Respondent, the latter, therefore, suffered no damage as that term is known to the law, and consequently was not entitled to recover under a presumptive measure of damages, especially in view of the fact that such a measure was offered in Congress but stricken from the bill as passed.

Finally, Petitioner unsuccessfully contended below that if a presumptive measure of damages be allowed, measured by the amount in dollars and cents that proportionate

equality was lacking, then in view of the volume of sales, it necessarily follows that proportionate equality was not lacking to the extent of $10 a week, for each calendar year, nor for the entire period, viewed in the aggregate.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A. The case is one of first impression. Decisions which have touched upon sub-sections (d) and (e) have done so in conjunction with the larger issues presented by sub-section (a). But sub-section (a) is not in this case. Here there is involved only sub-sections (d) and (e) of the Robinson-Patman Act which have to do with "proportionate equality". Consequently, the Circuit Court of Appeals has decided an important question of Federal law which has not been decided by any other Court and which should be settled by this Court. The use of "demonstrators" is nation-wide and industry-wide. (R. 40) It comes under the meaning and intent of the Robinson-Patman Price Discrimination Act just as much as booking practices, basing point system of freight charges, and advertising allowances considered by this Court in

Corn Products Refining Company v. *Federal Trade Commission*, ... U.S. ...., 65 S. Ct. 961, decided April 23, 1945, and

Federal Trade Commission v. *A. E. Staley Manufacturing Company*, ... U.S. ...., 65 S. Ct. 971, decided on the same day.

B. The Circuit Court of Appeals has decided another important question of Federal law which has not been decided by any other Court and which should be settled by this Court, namely: That actual difference in volume will not be a defense in a suit for violation of Sub-sections (d) and (e) unless the defendant affirmatively shows that payments made were at the outset agreed and understood to be based upon volume. Thus, that liability for damages

may be predicated upon the making of a contract unlawful under the Act, and not upon damages ensuing therefrom.

C. The Circuit Court of Appeals either inadvertently assumed the contract in the beginning was not based upon or related to volume and that it provided no competitive way for Respondent to get a full demonstration, or the Court put the burden on Petitioner to prove the contract in its inception was unlawful. The question of the burden of proof in a civil suit involving Sub-sections (d) and (e) of the Robinson-Patman Act is one which has not been decided by any other Court and should be settled by this Court.

D. The question as to how proportionate equality is judicially determined when, as happened here, a complaining party commences its operation in the middle of a calendar year and has a competitor which has handled the merchandise over a long period of time so that there is no yardstick by which volume of the complaining party may be determined at the outset, except by its potential, is one which has not been but should be settled by this Court.

E. The great importance of the statute to the business world and the legal profession and the need of an authoritative and elucidating decision defining "proportionate equality" and also deciding the equally important question as to whether the amount of an alleged price discrimination is, without more, recoverable under the Robinson-Patman Act which contains no provision for damages in a civil suit.

F. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with decisions of this Court, namely: In determining damages under statutes prohibiting discriminations, this Court has uniformly held that the amount of discrimination without more is not recoverable as damage, and that the only dam-

ages recoverable are those known to and recognized by the law.

Pennsylvania Railroad Company v. *International Coal Mining Company*, 230 U.S. 184;

Interstate Commerce Commission v. *United States ex rel. Campbell, et al.*, 289 U.S. 385.

The statutes involved in those cases demanded equality of treatment. Sub-sections (d) and (e) have the same purpose except they demand "proportionate equality". The Robinson-Patman Act, as did the statutes involved in the cases cited, provides for criminal sanctions and the exercise of corrective power by a quasi-judicial tribunal. Moreover, allowance of a sum representing the difference in refunds or payments and then trebling same aggravates the very discrimination which the statute was designed to prevent, which is what this Court condemned in the cases cited. Again, this Court has uniformly held in a suit for damages under the Anti-Trust statutes it is requisite to recovery that both violation and the fact of damage be proved, and that those damages be such as the law recognizes.

Keogh v. *Chicago and N. W. Railway Company, et al.*, 260 U.S. 156.

Petitioner respectfully urges that the application of a presumptive measure of damages in this case, absent loss of business, absent loss of profits, absent injury to business, is in conflict with the decisions of this Court noted hereinabove.

Wherefore, your Petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled on its Docket No. 12,897, Civil,

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to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said United States Circuit Court of Appeals for the Eighth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated this 10th day of October, 1945.

ELIZABETH ARDEN SALES CORPORATION,

By J. Howard Carter,
A. W. Dobyns,
A. F. House,
Counsel for Petitioner.

J. W. BARRON,
Of Counsel for Petitioner.